Supreme Court, U. S.
FILED
JUL 25 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1279.

THE WILLIAMS & WILKINS COMPANY,
Petitioner,

—against—

THE UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Claims.

BRIEF AMICI CURIAE FOR AMERICAN SOCIETY FOR TESTING AND MATERIALS NATIONAL COUNCIL OF TEACHERS OF MATHEMATICS AMERICAN SOCIETY FOR MICROBIOLOGY Editor-in-Chief, JOURNAL OF UROLOGY

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With the consent of both parties, the AMERICAN SOCIETY FOR TESTING AND MATERIALS, NATIONAL COUNCIL OF TEACHERS OF MATHEMATICS, AMERICAN SOCIETY FOR MICROBIOLOGY and the Editor-in-Chief of the JOURNAL OF UROLOGY respectfully submit this brief. The letters of consent have been filed with the Clerk of this Court.

THE INTEREST OF AMICI CURIAE.

American Society for Testing and Materials.

The AMERICAN SOCIETY FOR TESTING AND MATERIALS is a scientific organization formed in 1898 for the purpose of promoting knowledge of the materials of engineering and standardizing specifications and methods of use. It is a nonprofit corporation having tax-exempt status as a charitable organization. The Society has more than 20,000 members. These include individuals, corporations, associations, governmental departments, universities and other bodies, technically qualified to carry on the work of the Society. At the present time ASTM has on hand and for sale more than 4,700 publications furnishing standardizing specifications for engineering materials and methods of testing such materials. Nearly 75% of its income is derived from the sale of its publications notwithstanding the Society freely grants to scholars, engineers and scientists the right to reference, to extract, or to use selected portions of its publications without charge. However, since the early 1920's copies of entire documents or reprints, whether they be single or multiple copies, are assessed a charge. Accordingly, if any substantial number of its approximately 50,000 customers were to obtain one copy of an ASTM publication from a photocopier, without payment to ASTM for the privilege, the loss to the Society would be severe.

National Council of Teachers of Mathematics.

The NATIONAL COUNCIL OF TEACHERS OF MATHEMATICS (NCTM) was organized in 1920. Its purpose is to assist in promoting the interests of mathematics in America and to vitalize and coordinate the work of local organizations of teachers of mathematics. The NCTM, the only organization of its type, has had a major influence on the teaching of mathematics. Outstanding persons in mathematics education have been leaders and participants in its program. It has served as an agency for both the coordination and stimulation of major efforts to improve the teaching of mathematics.

The NCTM publishes four journals: *The Mathematics Teacher; The Arithmetic Teacher; The Mathematics Student Journal;* and *The Journal for Research in Mathematics Education.* NCTM also publishes yearbooks on particular problems and numerous books and pamphlets on a wide range of topics. It has 47,000 individual members with 30,000 institutional subscriptions to *The Mathematics Teacher* and *The Arithmetic Teacher.*

NCTM is interested in this suit because of its belief that reasonable compensation from photocopy users is vital to the long-range economic health of specialized scholarly journals such as the ones published by NCTM. Continued publication of these journals provides to teachers and their students the most significant type of access to scholarly papers in their respective fields.

American Society for Microbiology.

The AMERICAN SOCIETY FOR MICROBIOLOGY (ASM) is a nonprofit scientific society, founded in 1899. As stated in its *Constitution:* "The objects of the SOCIETY shall be to promote scientific knowledge of microbiology and related subjects through discussions, reports, and publications, to stimulate scientific investigations and their applications, to plan, organize, and administer projects for the advancement of knowledge in this field, to improve education in the science, to promote programs of professional recognition, and to foster the highest professional and ethical standing of microbiologists."

ASM, with its more than 19,000 members, is the dominant microbiological society in the U. S., and, because microbiology, with its emphasis upon single living cells and the molecular events which occur within them, dominates modern biology, ASM is the largest biological society in the U. S.

ASM currently publishes seven scientific journals, each of which is a leader or the leader in its respective field: *Journal of Bacteriology, Journal of Virology, Infection and Immunity, Applied Microbiology, Antimicrobial Agents and Chemotherapy, Bacteriological Reviews,* and *International Journal of Systematic Bacteriology.* An eighth scientific journal (*Journal of Clinical Microbiology*) will commence publication in January 1975. ASM also publishes *ASM News,* a monthly news magazine, as well as a number of books, pamphlets, etc.

The ASM Operations Budget for the fiscal year ending 30 June 1975 provides for total disbursements of $2,571,625, of which $1,959,400 will be expended upon publications. Thus, ASM is a "publishing" society, as are most organizations primarily comprised of research scientists.

The research process is not complete until the research results have been effectively communicated to those who need and can benefit from those results. Thus, we know why we are in the publishing "business" and we believe that it is of fundamental importance that we stay in this "business." It is for this reason that we join in this brief.

We are convinced that wholesale copying of our publications seriously depresses our publication income. We have seen a drop in our nonmember subscriptions, and this certainly traces to copying of our materials in the libraries. Copying technology should be used as an effective aid in the dissemination of scientific research results. However, those who copy should contribute to the costs of publication.

Otherwise, the communication process faces eventual destruction.

Editor-In-Chief, Journal of Urology.

The Journal of Urology was founded in 1917 and became the official publication of the American Urological Association in 1920. Its purpose is to offer to the medical profession scientific contributions in urology that are considered to be of educational or of practical value. Urologists, not unlike other specialists in medicine, have a responsibility for education, research and practice. The Journal of Urology is considered an important spoke in the wheel of activities fulfilling this responsibility.

Dr. Hugh J. Jewett has been associated with the Journal since the late 1930s and became Editor-in-Chief in 1966. During this period this publication has developed into an important instrument for doctors in urology as well as related fields. There is an absolute need for this Journal, which is acknowledged to be the leading periodical in its field.

Currently, the Journal of Urology is issued monthly to more than 12,000 subscribers, the majority of whom are practicing urologists in the United States and in many foreign countries. About 3,500 of these subscribers are members of the American Urological Association. The Journal is published in two volumes yearly, each volume consisting of approximately 1,000 pages of text and illustrations. The publication depends on the monies it receives from subscribers, advertisers and back volume and reprint sales.

Dr. Jewett is interested in the suit because of his concern over the economic consequences "free" photocopying of articles will have on the future of the Journal. If individuals are allowed to obtain from libraries copies of only

those articles in which they are interested, the Journal of Urology as well as comparable publications are going to lose subscribers. Subsequently, the advertisers' revenue will be decreased since the advertising rates depend on the number of subscribers. He, therefore, believes that the Journal must be supported, in one way or another, by all those who use the contents between its covers. If the Government is successful in its suit with The Williams & Wilkins Company, Dr. Jewett is convinced that it will mean destruction of the economic system upon which the Journal was founded and upon which it continued to grow since 1917.

The American Society for Testing and Materials, National Council of Teachers of Mathematics, American Society for Microbiology, and the Editor-in-Chief, Journal of Urology, support the decision of the Trial Judge James F. Davis and three dissenting Court of Claims judges that respondent's massive system of reproducing single copies of copyrighted articles is an infringement of the copyright.

THE PURPOSE OF THIS BRIEF.

One of the points touched on in the brief of the petitioner is whether or not xerography is in fact printing and/or reprinting within the meaning of 17 U. S. C. § 1(a).[1] This brief will be directed solely to that question, by way of an explanation of the art of xerography, particularly in conjunction with microfilm.

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1. "§ 1. Exclusive Rights as to Copyrighted Works.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
(a) To print, reprint, publish, copy, and vend the copyrighted work:"

DEFINITIONS AND THE OPINIONS BELOW.

Section 1(a) of the Copyright Law provides the copyright owner with the exclusive right "to print, reprint, publish, copy and vend the copyrighted work". The Trial Judge James F. Davis found that "NLM and the NIH library did not merely 'copy' the articles in suit; they, in effect, 'reprinted' and 'published' them." He pointed out that: 'Printing' and 'reprinting' connote making a duplicate original, whether by printing press or a more modern method of duplication. *MacMillan Co. v. King*, 223 F. 862 (D. Mass. 1914); M. Nimmer, Copyright § 102 (1971 ed.)."[2]

On review, the majority of the Court of Claims made the observation[3] that the photocopy process of NIH and NLM does not even amount to printing or reprinting in the strict dictionary sense.[4]

It is submitted that the definition of Trial Judge Davis accords with usage. For example, it would appear to be reflected in this Court's current definition of "printing" for the purposes of its rules. Rule 39(4) now states that "Printing", as used in the Rules, "shall include any process capable of producing a clear, black image on white paper, but shall not include ordinary carbon copies."

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2. 172 U. S. P. Q. 670, 678.

3. 487 F. 2d 1345, 1349, 180 U. S. P. Q. 49, 53.

4. Actually, the word "print" is defined (Webster's Third New International Dictionary) as "to make a copy of by impressing paper against an inked printed surface *or by an analogous method*". [Emphasis added.] The word "reprint" is defined as "a subsequent printing of a book already published having the identical text of the previous printing. The word "reprint" is also defined as "an article or extract issued separately after being first published as part of a collection or in a periodical". The word "reprint" in verb form is defined as "to print again; make a reprint of".

FACTS.

The findings of the Court of Claims adopt the following undisputed facts found by the Trial Judge:

> "15. . . . The NIH photocopying service uses two Xerox copying machines and two Recordac microfilm cameras. The microfilm cameras are used in conjunction with a Xerox Copy-Flo Printer to provide NIH personnel with permanent copies of journal articles . . ."[5]
>
> "21(b). To make photocopies NLM uses mobile 35-mm microfilm cameras which have an electrical power line overhead and can move up and down an aisle of the library. Full-size photocopies are then made from the microfilm. Most photocopies are made by such microfilm technique . . ."[6]

THE ART OF XEROGRAPHY[7]

In recent years dry photographic processes have come into extensive use in the photocopy field. Foremost among these processes are those involving electrophotography in which photoelectric phenomena are utilized to form electrical images. These processes were given the new name of "xerography" which is derived from Greek and has a literal meaning of "dry writing".

Xerographic processes have been incorporated in equipment for copying and duplicating, in automatic machines for photography, microfilm enlarging, facsimile printing, and printing of computer data.

5. Finding of Fact 15, Petition Appendix 80.

6. Finding of Fact 21(b), Petition Appendix 84.

7. The following description of xerography including the figures has been digested from *Electrophotography* by Dr. R. M. Schaffert published by The Focal Press (1965). For another comprehensive book on xerography see *Xerography and Related Processes* edited by J. H. Dressauer and H. E. Clark, published by The Focal Press (1965).

Five steps are usually involved in making a print by xerography:

(1) Sensitizing the xerographic plate by electrical charging;

(2) Exposing the plate to form a latent electrostatic image;

(3) Developing the latent image with fine particles;

(4) Transferring the developed image to paper or other materials; and

(5) Fixing the image by fusing.

The plate can be cleaned and used over and over again for hundreds or even thousands of exposures.

One way of performing the step of developing the latent image is called impression development. This involves a system of developing electrostatic images with a series of rollers which have been described by Schaffert as "somewhat analogous to the inking roller system used in printing presses." It is to be noted that this system is capable of high speed development and good prints have been produced at speeds of 30 inches per second surface velocity. The time required to produce a print by xerography is primarily dependent upon the speed of image development since other steps in the process are usually of short duration.

One of the well-known copying machines is the Xerox * 914 * copier. This is a desk-size copying machine in which all operations are automatic, except for insertions of documents or other materials to be copied. The units for charg-

* Trademarks of Xerox Corporation.

ing, exposing, developing, transferring and cleaning are appropriately stationed around the circumference of the drum, and all of these operations take place in sequence as the drum rotates. The developer is a mixture which cascades over the drum surface and is then collected and recirculated in the developer unit. Paper sheets are fed from the paper supply rack into the transfer station and are then conveyed through the fusing unit and out onto a receiving tray, as shown in Fig. 1.

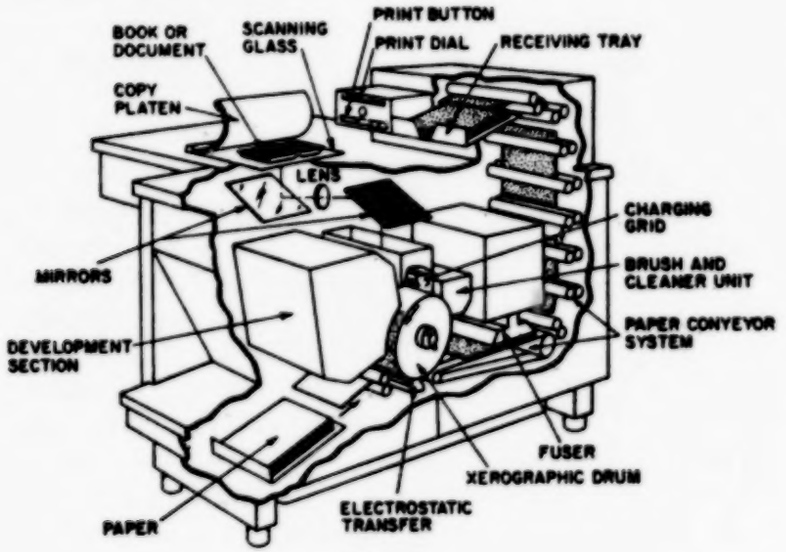

FIG. 1

The machine is capable of copying book and magazine pages as well as single-sheet documents. The paper on which the printing is made requires no special properties. Copies can be made on ordinary paper or on such sheets as vellum or offset paper masters. Copying speed, after a brief warm-up period, is 30 seconds for the first print, and 6 prints per minute thereafter. A more recent machine of this class is the Xerox 2400 * which is designed to produce copies at the rate of 2400 per hour.

One of the most recent machines is the Xerox 7000 * which is a versatile high-speed duplicator with a choice of five reductions. Originals up to 14" x 18" may be copied on 8½" x 11" copy paper and the copies can be made at the rate of 3600 copies per hour. This machine includes numerous other sophisticated features such as automatic sorting of copies, copying two documents at once with or without sorting, copying photographs and 3-dimensional originals, and double-side duplicating. This machine is also useful as a signature ** maker for making booklets with printing on both sides of the pages.

The first application of xerography to automatic continuous copying was in the field of microfilm enlargement. A xerographic machine for producing enlarged prints from microfilm was developed by the Xerox Corporation for the U. S. Navy in 1953. Since 1953 Xerox Corporation has produced a series of automatic copying machines under the trademark Copyflo.* These are rather large machines designed for high-volume output. The principle of operation of the Copyflo machines is illustrated in Fig. 2. The xerographic process used in such machines is similar to that of the Xerox 914 except that the paper is fed from a roll, and the printed copy is rewound on a take-up roll. Copy production is at the rate of 20 linear feet per minute.

Persons skilled in the art of xerography have equated electrostatic copying machines to plateless printing presses. As pointed out by Schaffert at page 144:

> "The Xerox Copyflo machines can be regarded as plateless printing presses, the plate being replaced

* Trademarks of Xerox Corporation.

** "Signature" is the trade term for a multi-page printed sheet, folded to form a booklet.

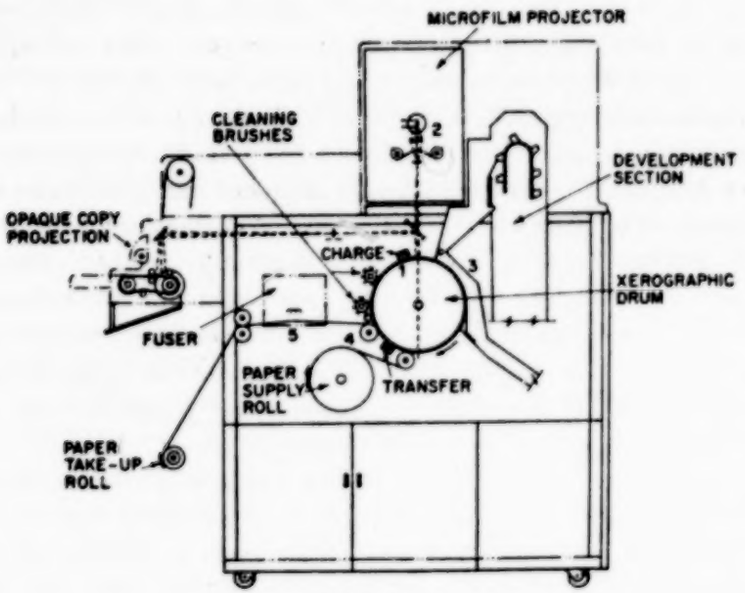

FIG. 2.

by a transparency, a piece of microfilm, or a sheet of paper containing the subject matter to be printed. The speed of 20 feet per minute, however, would be too slow for the usual commercial printing job. Nevertheless, when relatively few copies are needed, these machines can become quite useful, particularly in reprinting out-of-print materials. For example, it is quite feasible to print a single copy or several copies of an entire book either directly from an existing copy or from microfilm. Presumably, photocopy machines utilizing zinc-oxide papers could also be adapted to handle similar printing jobs." (See footnote 7.)

8. It has been noted that the NIH library photocopy service employs 2 Xerox copying machines and 2 Recordac microfilm cameras in conjunction with a Xerox Copyflo printer. See p. 12, *supra*.

In addition to the Xerox Copyflo machines,[8] there are other known electrostatic printing presses. For example an electrostatic printing press has been developed by Harris-Intertype Corp. for the U. S. Army and a similar printing machine was developed from Radio Corporation of America for the U. S. Army Engineer and Development Labs. The Xerox Corporation has also developed for the U. S. Air Force an automatic xerographic printer which makes finished continuous-tone positive prints from photographic negatives. The machine was designed primarily for use in high speed, high volume printing from aerial film for mapping and reconnaissance purposes.

Xeroprinting is a by-product of the development of xerography. Xeroprinting is the name given to an electrostatic printing process designed to print many copies of a subject, document or page from a master plate or cylinder. The printing master or plate consists of a metal sheet or cylinder upon which is imprinted an image in the form of a thin, insulating coating. The image areas consist of insulating material and the background areas are bare metal.

When the master plate is electrically charged by passing it under a corona charging unit, the charges deposited on the insulated image remain on the image surface and those deposited on the bare metal areas are conducted away to ground. Thus an electrostatic image corresponding to the insulated areas is formed. From this point on, the making of a print follows a sequence of steps similar to xerography, i.e., the image is developed with powder, transferred to paper, and the powder fused to the paper. A drawing of an experimental xeroprinting press made in 1948 is shown in Fig. 3. This press was operated at printing speeds up to 1200 feet per minute.

It thus clearly appears that xerography is not only analogous to traditional printing but it actually resembles

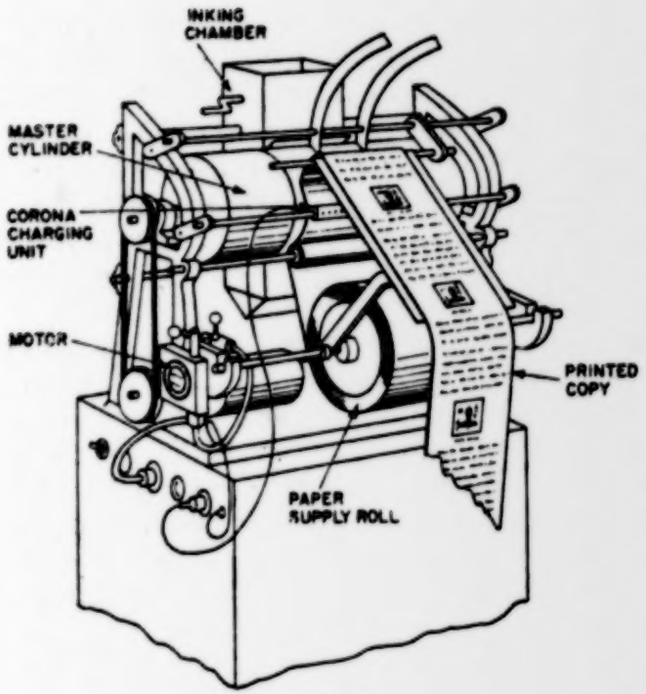

FIG. 3

printing in important details. When we turn our attention to variant forms of printing—utilizing photographic or the more modern photoelectric techniques—the parallel is even more striking.

When more than a few copies of a document are required it is usual to employ one of the duplicating processes. One of the best known is offset duplicating which is essentially a special type of lithographic printing. One of the first commercial applications of xerography was in the preparation of offset paper masters. The powder image was simply transferred from the selenium plate to an offset master sheet and bonded to the sheet by heat fusing. After

the usual chemical treatment of the sheet it was attached to the cylinder of the duplicating machine. Thousands of copies could then be printed if needed. The lithographic principle requires that the printing areas be ink receptive and water repellent, and that the background or non-printing areas be water receptive and ink repellent. The fused xerographic powder which contains a high proportion of water repellent resins was found to be ideally suited for the preparation of paper offset masters.

This application of xerography provided a rapid photographic method of preparing offset masters. The conventional steps of processing negatives and the photo-mechanical operations of preparing plates were eliminated. The simplicity, speed, and flexibility of the method led to a multitude of uses in the duplicating and reprinting of documents and other materials that carried far beyond the normal routine of office duplicating. Old documents could be reprinted with deletions and additions if required, and records could be reproduced and brought up to date.

The success of xerography in offset duplicating led to the investigation of potential applications of xerographic techniques in commercial lithographic printing. Paper-base lithographic printing plates, such as those obtained by transfer from selenium xerographic plates, are suitable for short runs up to perhaps 10,000 impressions. For larger runs and for multi-color printing the greater durability of metal plates is required. A process for converting a xerographic metal plate into a lithographic printing plate has been shown to be feasible in the laboratory although it has not found wide commercial usage as yet. In the highly competitive industry of commercial printing, printing quality is of prime importance. New processes, therefore, must measure up to quality control standards before they can become established in this field.

As pointed out by Schaffert at page 143:

> "In the gap that separates the long-run printing job and small-run duplicating job, xerographic techniques have found a place of importance. For many years there has been a need for economical production methods applicable to short-run printing of certain types of books, pamphlets, and other limited distribution publications, and for the reprinting of out-of-print materials in limited quantities. The preparation of printing plates for such jobs by conventional methods may prove to be too costly and time consuming. It is in this area that lithographic plates made by xerography show promise of making worthwhile contributions to the art of printing." (See footnote 7.)

THE ART OF PRINTING.

The dictionary definitions with regard to printing and reprinting have been set forth at page 7 of this brief. In order to put them in the proper perspective it must be recognized that prior to the invention of printing documents and books were in the form of manuscripts written by scribes. The process of printing has been contrasted with the method of writing in an early copyright decision of *Keene v. Wheatley et al.*, 14 Fed. Cas. 180, 192 (No. 7644). (C. C. E. D. Pa. 1861). In that decision it was stated:

> "Writing is a method of originally developing the composition, and of adding copies made singly, letter by letter. *Printing is a process of multiplying the copies, by sheets.* Thus the difference is that between multiplication and addition. Human means of increasing the number of copies by writing are extremely limited. By printing, they may, on the contrary, in the words of Lord Cranworth, be multiplied indefinitely. 4 H. L. Cas. 833. The books printed by those who first publicly practiced the typographic art in Europe usually contained an advertisement that they were not written, as all books had previously been, but were made by a new invention, whereby the several sheets were stamped at once, and not made line by line as formerly." [Emphasis added.]

As noted above, the Trial Judge found that NLM and the NIH library were not only "printing" and "reprinting" but also "publishing". He stated:

> "'Publishing' means disseminating to others, which defendant's libraries clearly did when they distributed photocopies to requesters and users." [See footnote 2.]

In *Keene v. Wheatley et al., supra*, the Court also had occasion to consider the meaning of the word "publish" in the copyright law in connection with the general distribution of a printed book, and stated ". . . the delivery of a *single copy* to a subscriber is a public circulation." (14 Fed. Cas. 193). [Emphasis added.]

While printing traditionally has been associated with the setting of type and a printing press, many changes have taken place in the printing art since the days of Gutenberg.[9] This has been judicially noted in a variety of settings. For example, the Patent Laws (35 U. S. C. 102),[10] like the Copyright Law, include reference to printing.

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9 For a glimpse of what the future holds for printing, see "Good-by to Gutenberg", January 24, 1966 issue of *Newsweek*, pages 85-88.

10. § 102. A person shall be entitled to a patent unless—
   a. the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or
   b. the invention was patented or described in a printed publication in this or a foreign country or in public use

In 1971 the Court in *Philips Electronic and Pharmaceutical Industries Corp. v. Thermal and Electronics Industries, Inc.*, 450 F. 2d 1164, 171 U. S. P. Q. 641 (3rd Cir. 1971) had before it the question of whether the microfilm of a German patent application was a prior "printed publication" within the meaning of 35 U. S. C. 102(a). The Court noted the "modern copymaking techniques and the widespread commercial, industrial and educational use of microfilm as well as its use in our libraries and data storage banks". The Court further noted:

> ". . . there have been revolutionary developments in techniques for reproduction, printing and dissemination of documents and data. The traditional process of 'printing' is no longer the only process synonymous with 'publication.' The emphasis, therefore, should be public dissemination of the document, and its availability and accessibility to persons skilled in the subject matter or art.
>
> The field is rapidly undergoing change and improvement. To restrict our interpretation of Section 102(a)'s 'printed' publication requirement solely to the traditional printing press would ignore the realities of the scientific and technological period in which we live and the underlying rationale of Section 102. We hold, therefore, that the term 'printed' as used in Section 102 can include documents duplicated by modern methods and techniques, including the now well established process of microfilming. Whether or not an individual microfilm is a 'printed' publication

10. (Cont'd.)
> or on sale in this country, more than one year prior to the date of the application for patent in the United States, or . . .

> within the meaning of the statute is *a question of fact* which ought to be determined by the application of criteria consonant with modern day methods of printing, duplicating and disseminating documents." (171 U. S .P. Q. 645) [Emphasis by Court.]

The Court approved the findings of the trial court that the German application, as microfilmed and indexed, was available and accessible, with the exercise of reasonable diligence, to persons ordinarily skilled in the art and that the application was a "printed publication" under the statute.

The Government as represented by the Patent Office also has had occasion to construe the meaning of "printed publication" under 35 U. S. C. 102 with respect to microfilm. In *Ex parte Garbo*, 141 U. S. P. Q. 913 (P. O. Bd. App. 1962) the Board of Patent Appeals had before it the question of whether or not a microfilm of a German patent application could be considered "prior art". The German patent application had been recorded on microfilm and offered for sale in the Bibliography of Scientific and Industrial Reports, Office of Technical Services, U. S. Department of Commerce. Garbo contended that the microfilm citation was neither "printed" nor "published" prior to his filing date. The Patent Office Board of Appeals in holding that such a microfilm was a "printed publication" under the statute made the following observation:

> "In the citation at hand, the Government undoubtedly went to considerable expense in accumlating the material contained in the microfilmed disclosures of which the citation is a part. The sole purpose of this expenditure was to make the information available to all who could use it. The Government in choosing microfilm as a vehicle selected the only economical

low cost method available to it for making this information available to the entire metal founding industry. It seems incongruous that the best of efforts by our Government to make more knowledge available shall come to naught through the patent system in effect nullifying these efforts by ruling that they are insufficient in law to accomplish the purpose for which they were intended." (141 U. S. P. Q. 916)

From the foregoing it is clear that under the Patent Laws the term "printed" can include documents duplicated by modern methods and techniques, including xerography and the now well established process of microfilming. It seems incongruous that the Government in construing the Copyright Law does not consider that making "Xerox" copies is equivalent to printing when as stated in "Good-by to Gutenberg",[11] "Xerography and other copying techniques have already turned every office mailroom into a publishing house."

CONCLUSION.

The decision of Trial Judge Davis is consistent with the constitutional purpose of the Copyright System and soundly concludes that the making of copies of whole articles whether by printing presses or a more modern method of duplication is proscribed by the Copyright Law.

Respectfully submitted,

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11. See footnote 9.